

AMENDED IN SENATE MAY 23, 2008

AMENDED IN SENATE MAY 12, 2008

AMENDED IN SENATE MARCH 28, 2008

SENATE BILL

No. 1053

**Introduced by Senator Machado
(Principal coauthor: Senator Perata)**

January 7, 2008

An act to amend Section 10148 of, to add Sections 10131.9, 10131.91, 10131.92, 10131.93, 10131.94, and 10131.95 to, and to repeal Section 10131.8 of, the Business and Professions Code, relating to real estate, *and making an appropriation therefor.*

LEGISLATIVE COUNSEL'S DIGEST

SB 1053, as amended, Machado. Real estate: brokers and salespersons.

Existing law, the Real Estate Law, provides for the licensure and regulation of real estate brokers and real estate salespersons by the Real Estate Commissioner, and makes a willful violation of that law a crime. Existing law authorizes the commissioner to, upon his or her own motion, investigate the actions of any person engaged in the business or acting in the capacity of a real estate licensee within the state.

Existing law defines a real estate broker as a person who, among other things, solicits borrowers or lenders for or negotiates loans or collects payments or performs services for borrowers or lenders or note owners in connection with loans secured directly or collaterally by liens on real property or on a business opportunity. Existing law requires a real estate broker engaging in that activity who meets certain criteria to annually notify the Department of Real Estate in writing.

This bill would delete that notification requirement and instead require a real estate broker who, among other things, makes, arranges, or services loans secured by residential real property to notify the department in writing, as specified, to pay specified penalties for failing to provide that notification, and to notify the department when he or she is no longer subject to this requirement. The bill would also require these brokers to keep documents and records that will enable the commissioner to determine whether specified functions performed by them comply with the Real Estate Law. The bill would authorize the commissioner to inspect and examine or audit the business documents and records of a real estate broker or salesperson in this regard after reasonable notice. The bill would also authorize the commissioner to require special reports from time to time from these brokers.

The bill would require a broker who makes, arranges, or services 8 or more of these loans in a calendar year to file various reports with the department commencing January 1, 2010, and would authorize the commissioner to cause an examination and report to be made and to charge the broker for 1 ½ times the cost of thereof, if the broker fails to timely file those reports. The bill would require the commissioner to examine the affairs of these brokers, and the brokers and salespersons acting under them, for compliance with the Real Estate Law, as specified, and would authorize the commissioner to impose penalties against those brokers or salespersons based on the findings of those examinations. The bill would enact other related provisions.

The bill would require that the penalties collected pursuant to its provisions be deposited into the Recovery Account in the Real Estate Fund and be available for expenditure, as specified, upon appropriation by the Legislature.

Existing law fixes maximum fees for licensees of the Department of Real Estate. Existing law requires these fees to be reduced to specified levels if funds are transferred or loaned from the Real Estate Fund to the General Fund by the Budget Act, irrespective of any provisions of the Budget Act precluding that reduction.

This bill, notwithstanding this provision mandating a reduction in fees, would authorize the department to increase license fees to offset the costs and expenses incurred relative to the requirements of this bill. By providing for an increase in revenue deposited in a continuously appropriated fund and for expenditure of that revenue, this bill would make an appropriation.

Because a willful violation of provisions of the bill would be a crime, the bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: ~~no~~ yes. Fiscal committee: yes. State-mandated local program: yes.

The people of the State of California do enact as follows:

1 SECTION 1. Section 10131.8 of the Business and Professions
2 Code is repealed.
3 SEC. 2. Section 10131.9 is added to the Business and
4 Professions Code, to read:
5 10131.9. (a) A real estate broker who acts pursuant to Section
6 10131.1 or subdivision (d) or (e) of Section 10131, and who makes,
7 arranges, or services loans secured by real property containing one
8 to four residential units, shall notify the department within 30 days
9 of the effective date of this section or upon commencing that
10 activity, whichever is later. The notification shall be made in
11 writing on a form that is acceptable to the commissioner.
12 (b) A real estate broker who fails to notify the department
13 pursuant to subdivision (a) shall be assessed a penalty of fifty
14 dollars (\$50) per day for each day written notification has not been
15 received, up to and including the 30th day after the first day of the
16 assessment penalty. On and after the 31st day, the penalty is one
17 hundred dollars (\$100) per day, not to exceed a total penalty of
18 ten thousand dollars (\$10,000), regardless of the number of days,
19 until the department receives the written notification.
20 (c) The commissioner may suspend or revoke the license of a
21 real estate broker who fails to pay a penalty imposed pursuant to
22 this section. In addition, the commissioner may bring an action in
23 an appropriate court of this state to collect payment of that penalty.
24 (d) All penalties paid or collected under this section shall be
25 deposited into the Recovery Account of the Real Estate Fund and
26 shall, upon appropriation by the Legislature, be available for
27 expenditure for the purposes specified in Chapter 6.5 (commencing
28 with Section 10470).

SEC. 3. Section 10131.91 is added to the Business and Professions Code, to read:

10131.91. (a) A real estate broker who acts pursuant to Section 10131.1 or subdivision (d) or (e) of Section 10131, and who makes, arranges, or services eight or more loans in a calendar year that are secured by real property containing one to four residential units, shall, commencing January 1, 2010, annually file with the department both of the following reports, as applicable, within 90 days after the end of the broker's fiscal year or within any additional time as the commissioner may allow for filing for good cause:

(1) The report of a compliance review by a licensed California independent public accountant, which shall be submitted for every broker's license under which a residential mortgage loan is made, arranged, or serviced during the fiscal year. The compliance review shall provide an independent evaluation of whether the activities conducted under the license were performed in accordance with applicable laws and regulations.

(2) If the broker establishes one or more trust fund accounts with an aggregate value of at least two hundred fifty thousand dollars (\$250,000) during the course of the fiscal year pursuant to Section 10145, the report of a review by a licensed California independent public accountant of trust fund financial statements, conducted in accordance with generally accepted accounting practices, which shall include within its scope the following information for the fiscal year relative to the business activities of the broker:

(A) The receipt and disposition of all funds of others to be applied to the making of loans and the purchasing of promissory notes or real property sales contracts.

(B) The receipt and disposition of all funds of others in connection with the servicing by the broker of the accounts of owners of promissory notes and real property sales contracts including installment payments and loan or contract payoffs by obligors.

(C) A statement, as of the end of the fiscal year, which shall include an itemized trust fund accounting of the broker and confirmation that the trust funds are on deposit in an account, or accounts, maintained by the broker at a financial institution.

1 (b) On or before September 1, 2009, the commissioner shall
2 develop a compliance manual for use by licensed independent
3 public accountants in performing the reviews referenced in
4 paragraph (1) of subdivision (a). The commissioner is authorized
5 to adopt regulations prescribing the form and content of the reports
6 described in subdivision (a).

7 (c) A broker subject to this section and Section 10232.2 may
8 file consolidated reports that include all of the information required
9 under this section and Section 10232.2. Those consolidated reports
10 shall clearly indicate that they are intended to satisfy the
11 requirements of both sections.

12 (d) If a broker subject to this section fails to timely file the
13 reports required under this section, the commissioner may cause
14 an examination and report to be made and may charge the broker
15 one and one-half times the cost of making the examination and
16 report. In determining the hourly cost incurred by the commissioner
17 for conducting an examination and preparing the report, the
18 commissioner may use the estimated average hourly cost for all
19 department audit staff performing audits of real estate brokers. If
20 a broker fails to pay the above amount within 60 days of the
21 mailing of a notice of billing, the commissioner may suspend the
22 broker's license or deny renewal of that license. The suspension
23 or denial shall remain in effect until the above amount is paid or
24 the broker's right to renew a license has expired. The commissioner
25 may maintain an action for the recovery of the above amount in
26 any court of competent jurisdiction.

27 (e) The reports described in this section are exempted from any
28 requirement of public disclosure by paragraph (2) of subdivision
29 (d) of Section 6254 of the Government Code.

30 SEC. 4. Section 10131.92 is added to the Business and
31 Professions Code, to read:

32 10131.92. (a) A real estate broker who acts pursuant to Section
33 10131.1 or subdivision (d) or (e) of Section 10131, and who makes,
34 arranges, or services loans secured by real property containing one
35 to four residential units, shall keep documents and records that
36 will properly enable the commissioner to determine whether the
37 residential mortgage brokerage, servicing, and lending functions
38 performed by the broker comply with this division and with all
39 rules and orders made by the commissioner under this division.
40 These documents shall include, at a minimum, the documents

1 described in Section 10148. Upon request of the commissioner, a
2 real estate broker shall file an authorization for disclosure to the
3 commissioner of financial records of his or her licensed business
4 pursuant to Section 7473 of the Government Code.

5 (b) Notwithstanding subdivision (a) of Section 10148, the
6 business documents and records of real estate brokers described
7 in subdivision (a) and real estate salespersons acting under those
8 brokers are subject to inspection and examination or audit by the
9 commissioner, at his or her discretion, after reasonable notice.

10 That real estate broker or salesperson shall, upon request by the
11 commissioner and within the time period specified in that request,
12 allow the commissioner, or his or her authorized representative,
13 to inspect and copy any business documents and records. The
14 commissioner may suspend or revoke the license of the broker or
15 salesperson if he or she fails to produce documents or records
16 within the time specified in the request.

17 (c) Inspection and examination or audit reports prepared by the
18 commissioner's duly designated representatives pursuant to this
19 section are not public records. Those reports may be disclosed to
20 the officers or directors of a licensee that is the subject of the report
21 for the purpose of corrective action. That disclosure shall not
22 operate as a waiver of the exemption specified in subdivision (d)
23 of Section 6254 of the Government Code.

24 SEC. 5. Section 10131.93 is added to the Business and
25 Professions Code, to read:

26 10131.93. (a) As often as the commissioner deems necessary
27 and appropriate, the commissioner shall examine the affairs of
28 each real estate broker who is required to file reports with the
29 department pursuant to Section 10131.91 for compliance with this
30 division. These examinations shall also include a review of the
31 affairs of all real estate brokers and real estate salespersons acting
32 under the supervision of each real estate broker who is required
33 to file reports with the department pursuant to Section 10131.91.
34 The commissioner shall appoint suitable persons to perform these
35 examinations. The commissioner and his or her appointees may
36 examine the books, records, and documents of the licensee, and
37 may examine the licensee's officers, directors, employees, or agents
38 under oath regarding the licensee's operations. The commissioner
39 may cooperate with any agency of the state or federal government,
40 other states, agencies, the Federal National Mortgage Association,

1 or the Federal Home Loan Mortgage Corporation. The
2 commissioner may accept an examination conducted by one of
3 these entities in place of an examination by the commissioner
4 under this section, unless the commissioner determines that the
5 examination does not provide information necessary to enable the
6 commissioner to fulfill his or her responsibilities under this
7 division.

8 (b) The commissioner may impose a penalty against a real estate
9 broker or real estate salesperson whose affairs are examined or
10 reviewed pursuant to subdivision (a) based on the findings of the
11 examination or review. The commissioner may suspend or revoke
12 the license of a real estate broker or real estate salesperson who
13 fails to pay that penalty. In addition, the commissioner may bring
14 an action in an appropriate court of this state to collect payment
15 of the penalty.

16 (c) Penalties collected pursuant to subdivision (b) shall be
17 deposited into the Recovery Account of the Real Estate Fund and
18 shall, upon appropriation by the Legislature, be available for
19 expenditure for the purposes specified in Chapter 6.5 (commencing
20 with Section 10470).

21 (d) The statement of the findings of an examination conducted
22 pursuant to this section shall belong to the commissioner and shall
23 not be disclosed to anyone other than the licensee, law enforcement
24 officials, or other state or federal regulatory agencies for further
25 investigation and enforcement. Reports required of licensees by
26 the commissioner under this division and results of examinations
27 performed by the commissioner under this division are the property
28 of the commissioner.

29 SEC. 6. Section 10131.94 is added to the Business and
30 Professions Code, to read:

31 10131.94. A real estate broker who acts pursuant to Section
32 10131.1 or subdivision (d) or (e) of Section 10131, and who makes,
33 arranges, or services loans secured by real property containing one
34 to four residential units shall make any special reports to the
35 commissioner that the commissioner may, from time to time,
36 require.

37 SEC. 7. Section 10131.95 is added to the Business and
38 Professions Code, to read:

39 10131.95. A real estate broker shall notify the department when
40 he or she is no longer subject to the notification requirements of

1 Section 10131.9. If a broker has already made reports required by
2 Section 10131.91 within the year, he or she shall continue reports
3 for that year, but shall notify the department prior to the expiration
4 of that year that he or she will no longer be servicing or arranging
5 loans for which reports are required. The department's records,
6 including those which may be disclosed by calling the license
7 information telephone number of the department, may then be
8 appropriately updated.

9 SEC. 8. Section 10148 of the Business and Professions Code
10 is amended to read:

11 10148. (a) Notwithstanding Section 10131.92, a licensed real
12 estate broker shall retain for three years copies of all listings,
13 deposit receipts, canceled checks, trust records, and other
14 documents executed by him or her or obtained by him or her in
15 connection with any transactions for which a real estate broker
16 license is required. The retention period shall run from the date of
17 the closing of the transaction or from the date of the listing if the
18 transaction is not consummated. After notice, the books, accounts,
19 and records shall be made available for examination, inspection,
20 and copying by the commissioner or his or her designated
21 representative during regular business hours; and shall, upon the
22 appearance of sufficient cause, be subject to audit without further
23 notice, except that the audit shall not be harassing in nature.

24 (b) The commissioner shall charge a real estate broker for the
25 cost of any audit, if the commissioner has found, in a final desist
26 and refrain order issued under Section 10086 or in a final decision
27 following a disciplinary hearing held in accordance with Chapter
28 5 (commencing with Section 11500) of Part 1 of Division 3 of
29 Title 2 of the Government Code that the broker has violated Section
30 10145 or a regulation or rule of the commissioner interpreting
31 Section 10145.

32 (c) If a broker fails to pay for the cost of an audit as described
33 in subdivision (b) within 60 days of mailing a notice of billing,
34 the commissioner may suspend or revoke the broker's license or
35 deny renewal of the broker's license. The suspension or denial
36 shall remain in effect until the cost is paid or until the broker's
37 right to renew a license has expired.

38 The commissioner may maintain an action for the recovery of
39 the cost in any court of competent jurisdiction. In determining the
40 cost incurred by the commissioner for an audit, the commissioner

1 may use the estimated average hourly cost for all persons
2 performing audits of real estate brokers.

3 *SEC. 9. Notwithstanding Section 10226.5 of the Business and*
4 *Professions Code, the Department of Real Estate may increase*
5 *license fees to offset the costs and expenses incurred in the*
6 *administration of this act.*

7 ~~SEC. 9.~~

8 *SEC. 10.* The Legislature finds and declares that Sections 4
9 and 5 of this act, which add Sections 10131.92 and 10131.93,
10 respectively, to the Business and Professions Code, impose a
11 limitation on the public's right of access to the meetings of public
12 bodies or the writings of public officials and agencies within the
13 meaning of Section 3 of Article I of the California Constitution.
14 Pursuant to that constitutional provision, the Legislature makes
15 the following findings to demonstrate the interest protected by this
16 limitation and the need for protecting that interest:

17 In order to allow the Department of Real Estate to fully
18 accomplish its goals, it is imperative to protect the interests of
19 those persons submitting information to the department to ensure
20 that any personal or sensitive business information that this act
21 requires those persons to submit is protected as confidential
22 information.

23 ~~SEC. 10.~~

24 *SEC. 11.* No reimbursement is required by this act pursuant to
25 Section 6 of Article XIII B of the California Constitution because
26 the only costs that may be incurred by a local agency or school
27 district are the result of a program for which legislative authority
28 was requested by that local agency or school district, within the
29 meaning of Section 17556 of the Government Code and Section
30 6 of Article XIII B of the California Constitution.